Nos. 525 & 526

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IN THE

Supreme Court of the United States.

Brf. of Lewinson for Appts.

CHIN BAK KAN,
Appellant,
vs.
THE UNITED STATES.

Filed March 7, 1902.

No. 525.

CHIN YING,
Appellant,
vs.
THE UNITED STATES.

No. 526.

BRIEF FOR APPELLANTS.

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CHIN BAK KAN, Appellant, vs. THE UNITED STATES.	No. 525.
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Brief for Appellants.

These are appeals from orders of the U. S. District Court for the Northern District of New York, affirming orders of deportation made against defendants-appellants in cases arising under the Chinese Exclusion Laws. Appeals were taken direct to this Court from the District Court, because treaty and constitutional questions are involved. These two cases were advanced and set down to be heard as one cause with the case of

United States vs. Lee Yen Tai (No. 503), which is here on a certificate from the U. S. Circuit Court of Appeals for the Second Circuit.

Both cases arose before U. S. Commissioner Woodward of the Northern District of New York, who issued his warrants for the arrest of defendants on March 13th, 1901, on complaints on information and belief only, not setting forth any sources of information or grounds of belief, charging defendants with being Chinese persons and laborers, who had just entered the United States unlawfully, and without the certificates prescribed by law. After hearings in each case, in which both defendants claimed to be American citizens, and after a transfer of the cases to Commissioner Dudley by consent, by reason of Commissioner Woodward's illness, orders of deportation were made against defendants. They appealed to the District Court under Section 13 of the Act of Sept. 13, 1888, where the orders of deportation were affirmed. These appeals were thereafter allowed by Mr. Justice Peckham.

In the CHIN BAK KAN CASE (No 525), the complaint is found in the Transcript of Record (fol. 29). Defendant pleaded not guilty (fol. 26), was advised of his right to refrain from testifying himself (fol. 26), in accord with a prior decision of Judge Coxe of that district (Ex. p. Sing, 82 Fed. Rep., 22, compare Lees vs. U. S., 150 U. S., 476; Sec. 860 Rev. St.), and introduced as a witness in his favor his uncle, Gong Wing (fol. 7), who testified to defendant's birth in San Francisco at No. 847

Dupont street, in a house where the witness's sister (defendant's mother), and her husband were then living, 22 years ago (fol. 8). The witness knew defendant for the next seven years after his birth in San Francisco; then defendant went to China with his parents, and the witness saw him there frequently during visits to China paid by the witness (1889-1891, and 1897 to 1899), and was thereafter advised of defendant's intention to come again to the United States. The Government introduced a witness, Lee Sing, who testified that the alleged uncle of the boy did not come to the United States till years after he stated, and that no woman lived in the house specified, though he concedes that many Chinese women lived at the time in San Francisco. The witness appears voluntarily to testify, admits that he had previously testified for the Government in another Chinese case, after first denying this (fol. 21), and knows nothing about any of the places in the neighborhood of No. 847 Dupont street, except the particular number defendant's witness had testified about on the prior hearing, remembers the exact date of said uncle's arrival in America, and the steamer, and does not explain satisfactorily how he acquired his exact knowledge about defendant's family and this house. The evidence that defendant's father was a merchant is uncontradicted (fol. 8), and there is no evidence to show that defendant himself is or ever was a laborer. On this record, the Commissioner has found, without a particle of evidence to sustain his holding, that defendant is a Chinese laborer

(fol. 27). On the material question of citizenship, he has made no finding but merely concludes, in accord with Section 2 of the Act of 1892, in order to fix the country to which defendant should be deported, that "said Chin Bak Kan came from the Empire of China, but he has not made it appear to me that he was a subject or citizen of some other country than China" (fol. 27).

In the CHIN YING CASE (No. 526), the complaint is found in the Transcript of Record (fol. 19). Defendant pleaded not guilty, and introduced as a witness in his favor, his uncle, Lee Hong, who testifies that defendant was born in San Francisco, at No. 721 Commercial street, thirty-one years ago, defendant living then in the same house. When defendant was 10 he went back to China, but witness saw him there during a year's visit to China ten years ago. Defendant's father wrote to him, advising him of defendant's coming. No evidence whatever was introduced as to defendant's being a laborer. The Government introduced no evidence whatever, except some documents not shown to refer in any way to this case, and rebutting the allegations of the complaint as to defendant's status, if they do pertain to this defendant (fols. 11–18). On the cross-examination of defendant's uncle, he had identified a photograph as a likeness of defendant, which was marked "Exhibit A for identification" (fol. 8), by Commissioner Woodward. Subsequently a paper which Commissioner Dudley marked Exhibit A was introduced in evidence (fol. 11). The record does not show it to be the same paper. It refers

to the application of a Chinese merchant, Sum Jim, for admission in December, 1899; none of the names or addresses of any of the parties therein are the same as those referred to in the evidence in this case. Even if the photograph could be assumed to have been that of this defendant (though marked only for identification), the papers in question do not contain any admissions by him or anyone shown to have been authorized to act for him, nor were they ever in his possession. If it should, however, be assumed that Sum Jim is this defendant Chin Ying, the uncontradicted evidence of at least three white witnesses, admitted by consent, shows that Sum Jim was a merchant in New York for years prior to his departure for China, May 27, 1897, answering the definition of Section 2 of the Act of Nov. 3d, 1893 (see Li Sing vs. U. S., 180 U. S., 486), that the collector arbitrarily and unjustly declined to admit him in 1899 on his return to the United States, and that, pursuant to law, he took an appeal to the Secretary of the Treasury, which is undetermined (fol. 11). His right and duty by affirmative evidence, when found within the country, to establish his right to remain here, in judicial proceedings taken against him, was recognized in the analogous Li Sing case (180 U. S., 486). Upon this evidence, the commissioner has found, without any evidence, that Chin Ying is a Chinese laborer (fol. 24). The material question of citizenship was not decided, but was treated in the same way as in the Chin Bak Kan case.

Upon these records the following assignments of error are urged:

(Chin Bak Kan Record, fols. 41–2.
Chin Ying Record, fols. 34–36.)

1st. That the commissioner had no jurisdiction over these causes, because the Treaty of 1894 repealed the procedure provision. (This question, certified to this Court in the Lee Yen Tai case, arises here in cases instituted after the Act of March 3d, 1901, had been passed, which Act, it is contended, does not change the result).

2d. The Commissioner acted without jurisdiction, because the complaints were not under such oath as is required by law.

3d. The Commissioner and Judge had no jurisdiction over defendants, because of their claim to American citizenship.

4th. The application of the burden of proof provision (Section 3 of the Act of 1892) to defendants, claiming American citizenship, is unconstitutional.

5th. The burden of proof provision was repealed by the Treaty of 1894.

6th. In not holding that appellants' American citizenship was established.

7th. In not ordering appellants' discharge.

As to the jurisdiction of this Court over these appeals, it is scarcely necessary to say anything, in view of the Government's concession of juris-

diction over appeals, and the precedents in this Court. Section 13 of the Act of Sept. 13th, 1888 (2 Sup. R. S., p. 144), in as far as it relates to appeals, was not made dependent by Section 1 of that Act upon the ratification of the Treaty with China of 1888, and hence appeals from Commissioners to District Courts were thereby authorized. Section 13 properly distinguishes, in thus allowing appeals, between the Commissioner and the Judge of the Court, just as the Bankruptcy Law allows certification from Referee to Judge, the proceedings both before the Commissioner and Judge being in the District Court, and the distinction being, not between "Judge" and "Court," but between "Judge" and "Commissioner" of the District Court; hence the Act allows appeals "to the Judge of the District Court for the district" and from the District Court under the Circuit Court of Appeals' Act (U. S. vs. Gee Lee, 50 F. R., 271, C. C. A., 9th Circuit; U. S. vs. Pin Kwan, 100 Fed. Rep., 609, C. C. A.; Wong Wing vs. U. S., 163 U. S., 228, 229; U. S. vs. Mrs. Gue Lim, 176 U. S., 459). In accordance with the express language of Section 13 of the Act of Sept. 13, 1888, allowing an "appeal," consideration of the peculiar non-legal nature of the proceedings and the remedy, and the precedents in this Court, appeals, and not writs of error, were secured.

I.

The point as to the Commissioner's jurisdiction under the treaty of 1894, taken in the Lee Yen Tai case, applies to these cases, notwithstanding the Act of March 3d, 1901, 31, Stat., 1093).

The question certified to this Court in the Lee Yen Tai case, and considered in the separate brief in that case, applies to these two cases also, notwithstanding the fact that the two cases now under consideration were commenced after the passage of the Act of March 3d, 1901 (31 St., 1093). (Reference is made to our brief in that case.)

That Act reads:

> *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, that it shall be lawful for the District Attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States, or having unlawfully entered the United States, to designate the United States Commissioner within such district before whom such Chinese person shall be taken for hearing.

Sec. 2. That a United States Commissioner shall be entitled to receive a fee of five dollars for hearing and deciding a case arising under the Chinese exclusion laws.

Sec. 3. That no warrant of arrest for violations of the Chinese exclusion laws shall be issued by United States Commissioners excepting upon the

sworn complaint of a United States District Attorney, Assistant United States District Attorney, Collector, Deputy Collector, or Inspector of Customs, Immigration Inspector, United States Marshal, or Deputy United States Marshal, or Chinese Inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States District Attorney of the district in which issued.

Sec. 4. That this act shall take effect immediately.

(1) That statute is inapplicable to the present cases, because it has not been followed. The written approval or request from the United States Attorney referred to in that statute was not given (see Second Assignment of Errors), the complaint not being made by any of the officers specified (French vs. Edwards, 13 Wall., 506; U. S. vs. Sapinkow, 90 F. R., 654, 660). Nor is the complaint under oath, as required by that Act (see Point II).

(2) The act in question does not confer jurisdiction on U. S. Commissioners. It is a mere reference to a jurisdiction supposed by the lawmaking body to have already been conferred. Even the original Section 12 of the Acts of 1882 and 1884, was regarded as almost too meagre to confer jurisdiction (*In re* Chow Goo Pooi, 25 F. R.,77). If the treaty has, as contended, taken away the Commissioner's jurisdiction in this class of cases, it is submitted that this clause does not suffice to confer it again. The erroneous belief of the legislature that a statute is still in force, even though expressed in a statute, does not

bind the Courts (U. S. vs. Claflin, 97 U. S., 546). This is particularly true where, as here, a violation of a treaty with a foreign power would result, and the legislative intent to violate such treaty must unmistakably appear.

(3) But, as suggested in the Lee Yen Tai brief, such statute cannot be given the force of law, as it would be unconstitutional. It would constitute a violation of the constitutional provision as to the appointment of U. S. Commissioners, by conferring such power in each particular case on authorities other than those designated by the U. S. Constitution (Article II, Sec. 2, par. 2), would be further illegal as a delegation of judicial power on an executive officer, and would violate due process of law and the constitutional separation of executive and judicial powers, in enabling prosecuting officers to improperly influence or coerce U. S. Commissioners, by withholding such causes and compensation from Commissioners who do not do the bidding of the particular executive officer.

Statutes of this character seem to be without precedent in our history; their obvious tendency to subvert fair and impartial judicial hearings is obvious.

(*a*) The statute is in violation of the constitutional provisions as to power of appointment of U. S. officers. Before an officer has been "appointed" to hear these cases, action to complete the appointment by the U. S. Attorney is necessary, to determine which of the various Commission-

ers may hear the case, no matter who is the complainant. The U. S. Attorney's motive need not be disclosed; his action may be based on any grounds that may appeal to him, his convenience, comfort, mistaken zeal, vanity, or desire to reach a particular result, or to make a "record."

But Congress has made different provisions for such appointment. In the recent case of

Rice vs. Ames, 180 U. S., 371, 378,

this Court, in dealing with the appointment of U. S. Commissioners, said:

> "Congress having provided for commissioners who are not judges in the constitutional sense, had a perfect right under Article 2, Section 2, paragraph 2 of the Constitution to invest the District or Circuit Courts with the power of appointment. * * * We know of no authority holding that Congress may not vest the Courts with this power, and we are reluctant to create one."

Here, instead of leaving the appointment to the "courts" or to one of the other authorities designated by the Constitution, the U. S. Attorney, the prosecuting officer, is authorized to take a hand in the appointment, and thus, in a measure, made a judge in his own case.

Article II, Section 2, paragraph 2 provides:

> "Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the Courts of Law, or in the heads of Departments."

This provision, though applicable, has been here disregarded by Congress.

U. S. vs. Germaine, 99 U. S., 508.

Contingencies of this very kind were anticipated and condemned by this Court, as applied to the Chinese Exclusion Laws, in

Wong Wing vs. U. S., 163 U. S., 228, 237, where it was held:

> "It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

(*b*) Moreover, such course is inconsistent with the fundamental principles of our Government, by which executive and judicial powers are separated.

In re Hayburn, 2 Dallas, 409, *note.*
Kilbourn vs. Thompson, 103 U. S., 168.
Interstate Com. Com. vs. Brinson, 154 U. S, 447, 480.

It constitutes an unauthorized delegation of judicial power.

U. S. vs. Rider, 50 F. R., 406.
U. S. vs. Keokuk Bridge Co., 45 Fed. Rep., 178.

Compare

U. S. vs. Rider, 178 U. S., 251.

Such course is contrary to due process of law (Holden vs. Hardy, 169 U. S., 366, 389, 390) and makes the prosecuting officer in some measure a judge in his own case (Cooley's Const. Limitations

(5th Ed.), pp. 410–413). The rule applicable is well laid down in the

Am. and Eng. Ency. of Law, (2d Ed.), Vol. VI., p. 1054.

> "To assume to vest judicial functions elsewhere than in the tribunals established by the constitution * * * would clearly be without the sphere of legislative action. Statutes which attempt to confer judicial power upon executive or ministerial officers are invalid."

The history of Anglo-Saxon jurisprudence shows how zealously the Courts have preserved our institutions from such encroachments upon judicial power.

II.

The complaints were not upon such oath as is necessary to confer jurisdiction upon the U. S. Commissioner.

(1) Both of these defendants claimed American citizenship, and we are not, therefore, dealing with cases involving conceded aliens. They were arrested under complaints stating no facts on oath against them, mere information and belief being averred, without any source or grounds therefor. Until their alienage be established, the provisions of the Constitution (4th Amendment) apply:

"No warrants shall issue but upon probable cause, supported by Oath or Affirmation."

A holding by this inferior magistrate, based upon

a reversal of the burden of proof, without any complaint even on oath, that defendants have not established to his "satisfaction" their lawful right to remain in the United States (Sec. 3 of the Act of May 5th, 1892), is no substitute for their constitutional privilege.

This Court has determined that Chinese persons born in the United States are citizens of the United States (U. S. vs. Wong Kim Ark, 169 U. S., 649), and persons claiming American citizenship cannot have their rights passed upon or violated by the application of such principles, applicable only to aliens.

Fong Yue Ting vs. U. S., 149 U. S., 698.

In fact, it will be observed that on the material point in these two cases, that of citizenship, the Commissioner has in fact made no finding whatever; he merely decides that the defendants are laborers, without a particle of evidence in the record to that effect.

(2) Apart from questions of citizenship, however, it is submitted that the laws applicable at the time of the arrest and trial of these defendants, even if they be regarded as aliens, required a complaint on oath, and not mere information and belief, as a prerequisite to the Commissioner's taking jurisdiction.

It is true that in the Fong Yue Ting case, 149 U. S., 698, 729, this Court held that under Section 6 of the Act of 1892 (the Registration provision)

> "no formal complaint or pleadings are required, and the want of them does not affect

> the authority of the judge, or the validity of the statute."

But that involved entirely different procedure provisions, and the non-registration proceedings do not present issues like those raised in alleged unlawful entry cases. Even the original Section 12 of the Acts of 1882 and 1884 much more clearly prescribed the usual oath as the basis of the warrant of arrest in these cases, and certainly does not dispense with the same.

But there have been a number of later enactments that are of great importance, in determining whether oaths are not prescribed in unlawful entry cases.

Section 13 of the Act of Sept. 13th, 1888, in terms prescribes that the arrest must be "upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States."

The applicability of this section to cases of this character was recognized in

> Wong Wing vs. U. S., 163 U. S., 228, 229, and
> U. S. vs. Long Hop, 55 F. R., 58.

Next we find that China, by the Treaty of 1894, made provisions designed to put an end to anomalous, barbarous arrests without oath, and it was provided that her subjects

> "shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation."

No such provisions for arrest except upon oath, is to be found on our statute books concerning the subjects of any other nation, most or least "favored."

Any possible question on the subject seems to have been removed, however, before these arrests were made, by the enactment of the Act of March 3d, 1901, which went into effect immediately, prescribing sworn complaints. For want of these, the commissioner herein acted without jurisdiction (See Statute quoted *supra*, Point I).

The decisions of the Courts are clear and authoritative to the effect that complaints like these, on information and belief alone, stating no sources or grounds of information or belief, are insufficient to confer jurisdiction.

Rice vs. Ames, 180 U. S., 371, 374.
Ex parte Hart, 63 F. R., 249, 259 (C. C. A.).
Ex parte Lane, 6 F. R., 34, 38 (Mr. Justice Brown).
U. S. vs. Tureaud, 20 F. R., 621.
U. S. vs. Sapinkow, 90 F. R., 654, 660.

The insufficiency of these complaints appears from mere inspection (Record in Chin Bak Kan case, No. 525, fol. 29; Chin Ying case, No. 526, fol. 19).

Not having acquired jurisdiction over them, the commissioner never was authorized to require defendants "by affirmative evidence" to establish to his "satisfaction" their right to remain in the

United States (Section 3 of the Act of May 5th, 1892) nor to order their deportation.

As said by this Court in Rice vs. Ames, *supra:*

> "The first assignment of error is to the effect that the commissioner issuing the warrant had no jurisdiction, because the complaint of Greer was upon information and belief, and not such as was required by the treaty, or by Section 5270 of the Revised Statutes. The first two complaints, which were dismissed, as well as the first count of the complaint, under which the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources or the grounds of affiant's belief."

POINT III.

The Commissioner had no jurisdiction over appellants, because of their claim of American citizenship, and the application to them of the burden of proof provision (Section 3 of the Act of May 5th, 1892) is unconstitutional.

Appellants claimed American citizenship as a defence to these proceedings, and the question arises whether the Commissioner had jurisdiction to determine that controverted question, particularly by the application of Section 3 of the Act of May 5th, 1892 (27 Stat., 25; 2 Sup. R. S., 13), providing that such person "shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof, to the

satisfaction of such Justice, Judge or Commissioner, his lawful right to remain in the United States."

This Court has not hitherto, directly or indirectly, sustained the validity of such a provision as applied to persons claiming American citizenship. These cases raise the question: May this right to citizenship be ultimately determined before an inferior magistrate like a U. S. Commissioner, not holdng a Court of Record, not part of "the judicial power of the United States," in proceedings in which persons are arrested on warrants not based on oath, are to be deported unless they establish "by affirmative evidence" to the "satisfaction" of such magistrate their rights, may have their evidence, even when uncontradicted, disregarded, and are deprived of opportunities to establish their rights, pursuant to the ordinary law of the land?

This Court has held, on the one hand, that if the Chinese persons were born in the United States, these laws do not apply to them (U. S. vs. Wong Kim Ark, 169 U. S., 649). On the other hand, if they are conceded aliens, these provisions, no matter how drastic, apply, and are constitutional (Li Sing vs. U. S., 180 U. S., 486).

The Chinese Exclusion Laws rest on the constitutionally unrestrained power of Congress to deal with aliens, with respect to their exclusion, as it pleases, free from the restraints checking other legislation in other respects (Fong Yue Ting vs. U. S., 149 U. S., 698). Congress can lawfully forbid all aliens or any class of aliens to enter the

country; it can constitutionally vest the determination of the rights of aliens to be or remain here in executive officers, or quasi-judicial officers, instead of excluding them absolutely (Lem Moon Sing vs. U. S., 158 U. S., 538). But this is all on the theory that aliens are being dealt with. These methods of determining their rights have been sustained merely as modifications of the right to exclude aliens entirely. It is submitted that the question whether the prisoner be an alien or not, cannot constitutionally be left for determination to such inferior magistrate, not exercising any part of the "judicial power of the United States," and through proceedings sustainable only as to aliens, and violating the bill of rights, reversing the burden of proof, denying constitutional right to secure witnesses, as applied to American citizens.

As held by Judge WHEELER in U. S. vs. Yee Mun Sang, 93 F. R., 364:

> "The validity of this provision rests upon the power of Congress to exclude aliens from the United States, and to commit the decision of their right to come or to remain to executive officers (Nishimura Ekiu vs. U. S., 142 U. S., 651; Lem Moon Sing vs. U. S., 158 U. S., 538). This is because they are, in fact, aliens, and as such may be excluded, and not because the power to decide whether they are aliens or citizens has been or could be committed finally by Congress to customs officials or other executive officers. In this case the officers did not assume to decide that appellant was an alien, but assumed that he was such, and to decide that he was not so made to appear to be a merchant as to entitle him

> to admission to this country as an alien Chinese merchant, and excluded him from admission as such. This is doubtless final as to his character as a merchant in that respect. But citizenship of the country is a status of the person that is attendant at all times everywhere, and cannot be taken away, or but in a formal way, as provided by law, be renounced even by act of the person."

While Judge Wheeler was, it is true, merely considering a determination by a Treasury officer, the same rule applies to a decision reached by a U. S. Commissioner, not exercising any part of the "judicial power of the United States," and proceeding under the anomalous methods of treating aliens, embodied in our Chinese Exclusions Acts.

The national census from 1870 on shows that, pursuant to the invitation of our treaties with China, thousands of Chinese citizens of both sexes had settled in the United States before the first exclusion act was passed in 1882. The present record shows through the mouth of a Government witness that during this time many Chinese women lived in San Francisco (Chin Bak Kan Record, folio 21), and naturally many children were born in the United States of Chinese parentage. As more clannish and alien than other foreigners, these residents would naturally acquire little information about our doings, adopt our customs only in slight degree, and for business and family reasons frequently return to China for visits, often with their infant children to be educated or reared in China. Such

instances are neither rare (Wong Kim Ark case) nor improbable (U. S. vs. Lee Seick, 100 Fed. Rep., 398, C. C. A., 9th Circuit; U. S. vs. Jue Wy, 103 F. R., 795). This Court has decided that such persons, born here under such conditions, are citizens of the United States (U. S. vs. Wong Kim Ark, 169 U. S., 649). The present case raises the question whether their rights can be constitutionally determined along the lines of our Chinese Exclusion Laws by U. S. Commissioners, with the restraints upon due process of law attached to those proceedings, and the determination of an inferior magistrate declared binding, who has jurisdiction only, if his own ruling as to his jurisdiction be correct. It is submitted that the right to American citizenship can be determined only in the exercise of "the judicial power of the United States," by magistrates vested with part of such power, and acting in accord with the Constitution, and not upon the assumption that the alienage to be proved, exists at the threshold, and will sanction the extraordinary methods to be employed to reach that conclusion.

This Court has held that U. S. Commissioners are not "judges in the constitutional sense" (Rice vs. Ames, 180 U. S., 371, 378. Todd vs. U. S., 158 U. S., 278), and are not vested with any part of "the judicial power of the U. S." (Robertson vs. Baldwin, 165 U. S., 275, 278; re-affirming Martin vs. Hunter's Lessees, 1 Wheaton, 304, 330, and Chisholm vs. Georgis, 2 Dallas, 419, 475). Of course, U. S. Commissioners are not appointed in accord-

ance with the constitutional provisions concerning the U. S. Judiciary (Article II, Section II, Par. 2 and Article III, Secs. 1 and 2). It is submitted that under these authorities, U. S. Commissioners cannot be constitutionally vested by Congress with power to determine this issue of American citizenship.

A historical review, as gathered from the law reports, shows that the deportation procedure in Chinese Exclusion cases has not been sustained as an exercise of judicial power, but as a constitutional method of dealing with conceded aliens, whose rights might have been left for the determination of purely executive officers as lawfully.

In re Chow Gooi Poi, 25 F. R., 77, 79, 80.
Fong Yue Ting vs. U. S., 149 U. S., 698.
Lem Moon Sing vs. U. S., 158 U. S., 538.
Li Sing vs. U. S., 180 U. S., 486.
U. S. vs. Hom Sing, 48 F. R., 635, 638.
Wong Wing vs. U. S., 163 U. S., 227, 237.

In U. S. vs. Hom Sing, *supra*, Judge Coxe quoted with approval the language of the Court (Sawyer, Hoffman & Sabin JJ.) in the case of Chow Goo Pooi, 25 Fed. Rep., 77, in which this procedure section was first considered. In that case those judges said, regarding Section 12 of the Act of 1882:

> "The power exercised by the magistrate is a power summarily to investigate and determine the right of a person to enter or remain in the country—a power sometimes conferred on Commissioners of immigration, but by this

law confided to a 'justice, judge or commissioner.'"

Judge Coxe adds: "He (the U. S. Attorney) further compared the functions performed by the 'justice, judge or commissioner' with those which, by the same statute are conferred upon the collector of the port and those which by the 'alien labor and immigration act' (26 Stat. L., 1084) are conferred upon inspection officers. This position is entirely correct. The investigation is summary, and the functions of the commissioners are akin to those exercised by the collector and inspectors."

Thus wrote the very Judge who appointed and directed the conduct of the Commissioner, who decided these cases, and who himself affirmed those rulings on appeal. It would appear that the omission to make any findings on the disputed "citizenship issue" was by design, as involving a matter not regarded as vested in those officers under this statute to determine.

Moreover, in the very case in question, Judge Coxe ruled that there was no authority to take depositions of non-resident witnesses in these cases (U. S. vs. Hom Sing, *supra*). In fact, there is no authority to subpœna witnesses in this class of cases either, no more than the immigration officers possess. Section 1014, Rev. Stat., applies only to criminal proceedings; Sections 876 and 877 apply only to cases in Court, not to cases pending before Commissioners (Todd vs. U. S., 158 U. S., 278; U. S. vs. Hom Sing, *supra*). No other provisions apply. In the Fong Yue Ting case the minority Judges pointed out this absence of authority to compel the attendance of witnesses under the analogous non-registration procedure provision (149

U. S., 698, 742). The answer of the majority was, not that the power to subpœna existed, but that there is an unrestrained constitutional right to try aliens so. The right so to treat persons whose alienage is in dispute, was not affirmed. In fact, U. S. Commissioner Rowe in Jersey City has accordingly (in February, 1902) in a series of Chinese exclusion cases now being tried before him, refused to issue subpœnas for witnesses residing out of the district, following a ruling just made by the Comptroller of the Treasury that such subpœnaing is unauthorized.

Compare also the class of cases in which the Commissioner's right to punish for contempt committed before him, has been denied, because he exercises none of "the judicial power of the United States" under the constitution.

In re Mason, 43 F. R., 510.
In re Perkins, 29 F. R., 909.
Ex parte, Doll, 7 Phil., 595.

Compare

U. S. vs. Schumann, 2 Abb. U. S., 523 (Field, J.).

Of course, an appeal from the Commissioner to the District Court, where the case is heard on the record below, the Commissioner's finding regarded as at any rate presumptively correct, particularly on the facts, and where opportunity to introduce new evidence according to the law of the land is withheld, is no substitute for the due process of law such alleged citizens are entitled to, to have their claims to citizenship determined.

We accordingly submit that the question of American citizenship cannot be lawfully left for determination in this class of cases, to an inferior Magistrate like a U. S. Commissioner, not holding a court of record, not exercising any part of the "judicial power of the United States" (Const., Article III, Section 1; Robertson vs. Baldwin, 165 U. S., 275), in proceedings in which there is no authority to secure the appearance of witnesses or otherwise secure due process of law, and that Section 3 of the Act of May 5th, 1892, as applied to persons claiming American citizenship is unconstitutional and contrary to due process of law, in requiring defendants in these cases by affirmative evidence to prove the necessary facts to the satisfaction of such inferior magistrate, after denying adequate opportunities to secure the evidence that may be requisite, and on the other hand, compelling the Government through its Chinese inspectors to secure its voluntary witnesses by tempting their cupidity by the offer of pecuniary or other rewards, to testify falsely in accord with the Government's position in these cases. Nor should the circumstance be overlooked that every proposed Chinese witness is himself subject to arrest and liable to be deported without cause, if he meets with Government disfavor, so that the Chinese inspectors maintain a reign of terror among the Chinese, inconsistent with giving honest Government evidence in these cases, and bound to elicit false testimony. This is not due process of law (Wing Wing vs. U. S., 163 U. S., 228; Holden vs. Hardy, *supra*).

POINT IV.

Even apart from defendants' claims to American citizenship, the burden of proof provision should not have been applied to them because it was repealed by Article IV of the Treaty of 1894.

Article IV of the Treaty of 1894 provides:

> "In pursuance of Article III of the Immigration Treaty between the United States and China, signed at Pekin, on the 17th day of November, 1880 (the 15th day of the tenth month of Kwangh sü, sixth year), it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the law of the United States to citizens of the most favored nation excepting the right to become naturalized citizens. And the Government of the United States reaffirms its obligation, as stated in said Article III, to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States."

This article became law subsequent to the Act of 1892. It is submitted that, inasmuch as there is no such burden of proof provision in force with respect to any other nation, this treaty has superseded the third section of the Act of May 5th, 1892, and thereby afforded protection to the persons of such Chinese individuals. This is in line with the decisions of the Courts relative to Article III of the Treaty of 1880, and this provision of the Treaty of 1894.

In re Quong Woo, 13 Fed. Rep., 229, 233 (Field, J.).

In re Ah Chong, 2 F. R., 733, 737–9.

In re Parrott, 1 F. R., 481, 485, 498.

Yick Wo vs. Hopkins, 118 U. S., 356, 368–9.

U. S. vs. Wong Kim Ark, 169 U. S., 649, 702.

Storti vs. Mass., 183 U. S., 138.

Compare Foreign Relations, 1893, pp. 263-4.

POINT V.

Appellant's American citizenship is established on the facts.

(1) The question of citizenship being a jurisdictional one, this Court is not bound by any finding against it that may be spelled out of the record.

In re Mayfield, 141 U. S., 107.

Cuday, Petitioner, 131 U. S., 280, 286.

Ex parte Farley, 40 F. R., 66–68.

Even on appeal in *habeas corpus* proceedings, the lower Court cannot make conclusive findings of fact on jurisdictional questions, shutting out review of the facts.

Johnson vs. Sayre, 158 U. S., 109, 115-116.

(2) In fact there is no finding in the record on this material question in issue, and its absence nullifies the order of deportation.

Saltonstall vs. Birtwell, 150 U. S., 417.

The errors attending the Commissioner's consideration of the cases are indicated by his finding, wholly without evidence, that defendants are laborers.

(3) There is no jurisdiction to pass on the question of citizenship in these proceedings.

(See Point III.)

(4) In the Chin Ying case, the legal evidence as to American citizenship is direct, persuasive, and even uncontradicted.

(See Statement of Facts, *supra.*)

In the Chin Bak Kan case, it is contradicted merely by the evidence of a voluntary witness produced by the Government who first swears falsely that he was never a Government witness in another case before, then admits the contrary, and who displays a wonderful amount of suspicious unexplained knowledge about the defendant's family and place of residence in California, while he is ignorant of everything else. It is submitted that his knowledge of the facts was acquired solely from a perusal of the prior evidence given by the witness for the defence, and under temptation arising from compensation to be secured through the Chinese Inspector for his voluntary appearance to testify against one of his compatriots, or fear.

POINT VI.

Aside even from the citizenship issue, defendant's right to remain here was established.

(*a*) Even if the procedure section be in force, as Article III of the Treaty has made the production of the certificate optional, there is no right to deport defendants for non-production of the certificate referred to in the complaints, and the evidence does not in the slightest degree justify the view that defendants are in fact laborers. That finding means merely that they did not produce the certificate deemed by the Commissioner, erroneously, as a matter of law, necessary to distinguish them from laborers.

(*b*) Assuming that defendant Chin Ying was successfully connected by the Government with the applicant Sum Jim, his right to enter as a returning merchant was established.

All the facts requisite under Section 2 of the Act of Nov. 3, 1893, were established (Li Sing vs. U. S., 180 U. S., 486). Nor are they contradicted.

Under Section 3 of the Act of 1892, even if he was rejected, his right to remain here was to be determined by affirmative evidence, in these judicial proceedings, independently of any action by the Collector. The Collector's action cannot be reviewed in the Courts in order to reverse the same, and to admit applicants (Lem Moon Sing vs. U. S., 158 U. S., 538), but in the case of a Chinese person found actually within the United States and arrested here, in judicial proceedings for his de-

portation, his rights are required to be investigated *de novo* and his right to be and remain here must be established by AFFIRMATIVE EVIDENCE under Section 3 of the Act of 1892, without reference to any prior decision pro or con by customs officials.

> "The judgment of the collector of customs did not preclude the Commissioner, and the latter had authority under the statute to hear and determine the question whether Li Sing was entitled to remain within the limits of the United States. The decision of the collector of customs not being conclusive as to the right of the petitioner to enter the United States, much less as to his right to remain therein, we are brought to consider the errors assigned."
>
> Li Sing vs. U. S., 180 U. S., 486, 490.

Directly in accord with our contention are the cases of

> U. S. vs. Chin Fee, 94 F. R., 828 (Wheeler, J.)
> U. S. vs. Wong Chung, 92 F. R., 141 (Coxe, J.).

The very terms of the Act of 1894 (28 St., 390), show that it deals only with actual exclusion, not with judicial inquiries, in cases of alleged unlawful entry.

Moreover, the record shows that an appeal to the Secretary of the Treasury was taken from the action of the collector. Such determination by

the collector, thus superseded, is not binding on the Courts.

In re Gin Fong, 89 F. R., 153.
U. S. vs. Wing Chung, 92 F. R., 141 (Coxe, J.).
In re Monaco, 86 F. R., 117 (Lacombe, J.).
See acc. Passavant vs. U. S., 148 U. S., 214.

The orders appealed from should be reversed.

Respectfully submitted,

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